No. 45042-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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James Dunn, Respondent,
and
Melissa Dunn, Appellant.

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# RESPONSE BRIEF OF APPELLANT

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Melissa Dunn
Pro Se
3751 Colonial Lane S. E.
Port Orchard, WA 98366

Melissa Dunn

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## I. Response to Introduction

The first issue I would like to address in Mr. Dunn's response brief is the statement, "She has not assigned error to any of the Court's factual findings." (Resp. Brief 1). Since apparently Mr. Dunn's counsel found this fact to be noteworthy enough to include in his brief, I feel my reasoning for not doing so is required as well as request for remedy if deemed appropriate. Mr. Dunn's counsel also points out, although written findings of fact on all 11 factors are preferable, the Washington State Supreme Court does not require them when the 11 relocation factors are addressed in the Court's oral findings supported by substantial evidence in the record. (Resp. Brief 1). Contrary to Mr. Dunn's position that the trial court's oral findings sufficiently addressed all required factors, the crux of the argument in my opening brief is based on the fact that all 11 statutorily required factors were not specifically addressed by the Court, orally and/or in writing; (App. Brief 7). As there were no specific findings to reference, I did not feel assigning error to "the Court's factual findings" was warranted or even appropriate. If the assignment of error to all 11 factors is required for proper consideration of the argument, I am asking this Court to consider this my request to include an assignment of error for every factual finding (or lack thereof) included in Sections IV(A)(i) –(xi) of my opening brief. (App. Brief 7-19)

The next issue in Mr. Dunn's introduction I would like to address is his counsel's reliance on the Marriage of Raskob case in support of his argument that "...when a party pursues relocation, the trial court has authority to modify the plan. There is no need for a finding of adequate cause." *Marriage of Raskob, 183 Wn. App. 503, 334 P.3d 30 (2014)*. The issue in counsel using this case is that it is not relevant to the

case at hand as the relocating parent in that Division I case had effectively pursued relocation as that Court stated in their opinion, "Here, Nanako never abandoned her relocation and did, in fact, relocate in violation of the parenting plan. Therefore, RCW 26.09.260(6) applies, and the trial court was not required to find some other substantial change in circumstances or consider the factors of RCW 26.09.260(2)." *Marriage of Raskob, 183 Wn. App. 503, 334 P.3d 30 (2014)* Although Mr. Dunn's counsel repeatedly asserts my statements regarding the renouncement of relocation only apply to the temporary proceedings, (Resp. Brief 1 & 20-21) they very clearly show I had not in fact permanently moved (and more importantly had not relocated DLD as she had been at her father's residence for his summer visitation when I had temporarily relocated while this trial was pending) or intended to pursue a move if the relocation was denied by the Court. I feel it would be more appropriate for this Court to defer to the opinion in the Grigsby case for this section. *Marriage of Grigsby, 112 Wn. App. 1, 57 P. 3d 1166(2002).*

II. Response to Counter-statement of the case

The only statement I would like to clarify in this section is, "On January 19, 2012, Ms. Dunn's boyfriend, Robert Enriquez threatened Mr. Dunn with a loaded gun." (Resp. Brief 2). I feel it is important for this court to take note that Mr. Enriquez was found not guilty of the charges and the court was aware of this (CP 201 and VRP 1/30/2013).

III. Response to Argument

A. Mr. Dunn's argument under this section appears to be centered on the idea "that the Court and the parties were fully aware of the need to address the statutory factors during the trial." And that "the trial court's oral ruling covers all of those factors." (Resp. Brief 5-6) which, per the argument in my opening brief I clearly disagree with. He presents the evidence he feels supports his position under each individual factor. Most of the "findings" made by the Court that Mr. Dunn relies upon are based on vague and irrelevant statements made by the Court that don't specifically and/or properly address any factor. In the following enumerated sections I will address the specific issues I have with his argument under each relevant individual factor I take issue with.

(1) Under this section, the only statements requiring clarification are Mr. Dunn's statement, "While living with Ms. Dunn, DLD missed three years of well-child checkups. *Id.* at 29." And James takes DLD to her numerous…doctor's appointments." (Resp. Brief 7) Included in the court record is a declaration from DLD's pediatrician, Amy Belko, dated January 31, 2012 stating, "She (Missy Dunn) has been in to see us with her daughter DLD DOB 2/7/04 over 50 times in almost 8 years for both well child check ups and ill visits. Her father has been in 3 times." (SCP___, Dkt. 24)

(2) Under this section Mr. Dunn contends, "In fact, there is no need for a court to address a factor that does not apply." (Resp. Brief 9) And references the Grigsby case. Nowhere can I find a statement in the Grisgby case that specifically states there is no need for a court to address a factor that does not apply. *Marriage of Grigsby, 112 Wn. App. 1, 57 P. 3d 1166(2002).* In addition, the Horner case states, "Did the trial court

enter specific findings of fact **on each factor**? If not, was substantial evidence presented in **each factor**, and do the trial court' s findings of fact and oral articulations reflect that it that it considered **each factor**? Only with such written documentation or oral articulation can we be certain that the trial court properly considered the best interests of the child and the relocation person within the context of the competing interests and circumstances required by the CRA." (emphasis added) *In re marriage of Horner, 151 Wash. 2d 884, 93 P. 3d 124, (2004).* In the Horner opinion, the Supreme Court did not state each **relevant** factor, it specifically a repeatedly stated **each factor**. This is quite contrary to Mr. Dunn's assertion under this section.

(3) Under this section, Mr. Dunn relies almost completely on information regarding Mr. Enriquez apparently due to the relationship between Mr. Enriquez and myself and his obvious involvement with DLD if the proposed relocation was to be granted. The first issue that needs to be addressed is, as mentioned previously, Mr. Enriquez was found not guilty as result of a jury trial held regarding the 2nd degree assault charges brought against him. (CP 201 and VRP 1/30/2013). Furthermore, Mr. Dunn fails to show evidence of any specific detriment to DLD and myself due to Mr. Enriquez' involvement with the relocation as it was a well known fact Mr. Enriquez had been residing with Daisha and I for 3 ½ years prior to my relocation request at our home in McCleary. In addition, Mr. Dunn agreed to a parenting plan designating me as the parent with primary residential placement of DLD just a couple months prior to my relocation request with the full knowledge that Mr. Enriquez was my boyfriend and resided with DLD and myself.

(4) Please refer to discussion under Section (2)

(7) Under this factor Mr. Dunn states, "But as noted above, the Court believed DLD's quality of life would suffer if she was taken away from her home town and was forced to live in a basement with a violent and alcoholic stepfather." (Resp. Brief 17). Please refer to my discussion in section (3) regarding this statement.

(9) Mr. Dunn states the Court ruling addresses this section by finding, "...the best alternative to relocation was to make Mr. Dunn the primary parent so that DLD would remain in McCleary." Although the court did not state any specific findings under this section, it did ultimately change custody of DLD to Mr. Dunn as a result of my relocation request. As mentioned previously in my opening brief and in this document, I informed the court I did not plan to move from McCleary if relocation was denied therefore to change custody without addressing any relevant factors of RCW 26.09.260 is not permissible as relocation was not in fact being pursued as per the definition discussed in the Grigsby case. *Marriage of Grigsby, 112 Wn. App. 1, 57 P. 3d 1166(2002).*

(10) The only statement made by the court Mr. Dunn states supports a showing of detriment under this section is, "The Court also found, however, that DLD could not be alone with Mr. Enriquez." (Resp. Brief 19)Please refer to the discussion of Section (3) regarding Mr. Enriquez' involvement with DLD before and after the proposed relocation.

In summary, many of the "findings of fact" Mr. Dunn addresses in his response are not supported by the oral articulations of the court and sufficient evidence present in the record therefore this court can't properly review the court's decision and should reverse the decision and remand for further proceedings as requested in my opening brief.

B. Mr. Dunn's argument under this section that "Because Ms. Dunn filed for relocation, the trial court had authority to modify the parenting plan without a finding of adequate cause." is clearly contrary to the decision in the Grigsby case. (Resp. Brief 20). In coming to a decision in that case the Court stated, "Had the Legislature indicated that a showing of adequate cause in not required after relocation is proposed for example the trial courts modification of the parenting plan here would have been proper. But the normal requirement of a showing of adequate cause is excused only so long as relocation is being pursued. Where, as here, the parent is no longer pursuing relocation, the parent proposing modification of the parenting plan must show a substantial change in circumstances, considering the factors set forth in RCW 26.09.260(2). "*Marriage of Grigsby, 112 Wn. App. 1, 57 P. 3d 1166(2002).*

Furthermore, Mr. Dunn contends the Grigsby case is not applicable to this case as seems to be of the opinion I had not renounced my intent to relocate after the judge had denied my request. (Resp. Brief 20-21). Unlike the Grigsby case in which the relocating parent apparently had renounced her intent to relocate **after** the court restrained her from relocating, I was unable to do so at that point as I had already moved per the court's earlier ruling requiring that I do so in order to determine the

possible benefits and detriments of relocation. (8/1/12 RP 50). And although I was unable to do it directly after the court's ultimate decision to deny relocation, I had indicated at prior hearings that I had not in fact relocated permanently and did not intend to do so unless the judge allowed it and that I was willing to reside with my mom in McCleary in order to retain custody of DLD. Despite Mr. Dunn's repeated assertions, this clearly demonstrates my willingness and full intent on not relocating without DLD if in fact the court denied my request. Therefore relocation was not being pursued per the Grigsby definition and a showing of adequate cause would have been required to proceed in a change of residential placement of DLD. RCW 26.09.260(2).

## IV. Response to Request for Attorney Fees and Costs

Despite which party prevails on appeal, I am certain this Court will find my argument has sufficient merit and as such Mr. Dunn's request for attorney fees based on lack of merit should be denied.

## V. Conclusion

As indicated in my opening brief, I am asking this court to reverse the trial court decisions denying relocation and granting Mr. Dunn's modification request and remand for further proceedings. In addition, I am asking that Mr. Dunn's request for attorney fees be denied.

March 23, 2015

Respectfully Submitted,

Melissa Dunn

Melissa Dunn, Pro Se
3751 Colonial Lane SE
Port Orchard, WA 98366

Certificate of Service

I, Melissa J. Dunn, hereby verity that I mailed via certified mail, a true and correct copy of this document to the Office of David B. Zuckerman at 1300 Hoge Building, 705 Second Avenue, Seattle, WA on March 23, 2015.

SUPERIOR COURT OF WASHINGTON
FOR GRAYS HARBOR COUNTY

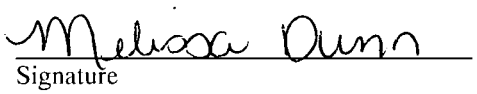
| | | |
|---|---|---|
| Melissa Dunn, | ) | |
| Appellant, | ) | Cause No. 45042-9-II |
| | ) | GH Cause No. 07-3-0020 |
| v. | ) | Supplemental |
| | ) | Designation of Clerk's Papers |
| James Dunn, | ) | |
| Respondent. | ) | |

TO THE CLERK OF THE COURT

Please prepare and transmit to the Court of Appeals, Division II, the following clerk's paper's.

| SUB # | Document | Date |
|---|---|---|
| 24 | Declaration of Amy Belko MD | 2/3/2012 |

March 23, 2015



Signature

Melissa Dunn
3751 Colonial Lane SE
Port Orchard, WA 98366
360-470-4734
Pro Se